

# ECHOES FROM THE SOUTH: ARGENTINA'S EARLY LEGISLATIVE DEBATES ON U.S.-STYLE JUDICIAL REVIEW

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## I. INTRODUCTION

Argentina was the first country after the United States to adopt and vigorously apply the U.S. model of judicial review.<sup>1</sup> Argentine governmental institutions dramatically changed as a result of Argentina's Constitution of 1853 and its 1860 amendments, and judicial review of Executive and Legislative acts played a central role in this change. Between 1863 and 1930, decisions by the Argentine Supreme Court had a major impact on Argentine political life—an impact that matches the U.S. Supreme Court's impact on U.S. politics through the same period. Further, as one of the first countries to adopt U.S. constitutionalism with its model of judicial review, the history of Argentina's adoption reveals a lot about how the transplantation of legal and political institutions can work.<sup>2</sup>

However, while Argentina achieved a high level of judicial independence and effective judicial protection for many civil liberties, the origin and course of its constitutionalism varied substantially from

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1. RAGNHILDUR HELGADÓTTIR, *THE INFLUENCE OF AMERICAN THEORIES ON JUDICIAL REVIEW IN NORDIC CONSTITUTIONAL LAW* 1–6 (2006).

2. This Article is part of a series of articles by the author on Argentine constitutionalism in the second half of the 19th century and early 20th century, with the earlier articles focusing primarily on the Argentine Supreme Court. *See generally* Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 *AM. U. L. REV.* 1483 (1997); Jonathan M. Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 *HASTINGS INT'L & COMP. L. REV.* 77 (1997); Jonathan M. Miller, *Courts and the Creation of a "Spirit of Moderation": Judicial Protection of Revolutionaries in Argentina, 1863–1929*, 20 *HASTINGS INT'L & COMP. L. REV.* 231 (1997).

that of the United States. Argentine constitutionalism began with few roots in Argentine traditions—instead, it was aspirational in nature, borrowed extensively, and sometimes blindly, from the United States, and during a critical generation, depended on the prestige of its U.S. model for legitimacy.<sup>3</sup> Yet the Constitution also met the aims of its Framers. From 1853 to 1930, Argentine constitutionalism provided enough stability to facilitate extraordinary immigration, investment, and economic growth. This period stands in marked contrast to the erratic booms, busts, and instability that have plagued Argentina during most periods since.<sup>4</sup> The Constitution's Framers were motivated in large part by opportunities from abroad,<sup>5</sup> and in practice Argentina reaped the promised rewards. The success ended with Argentina's military coup of 1930 and Argentina's institutional inability to cope with the challenges of the Great Depression and war in Europe. The coup touched off an institutional decline that has moved in tandem with Argentina's economic decline.<sup>6</sup> But subsequent failure does not eliminate the institutional accomplishments and relevance of the preceding seventy years.

A remarkable amount of social science research has recently focused on Argentina's courts as part of the increasing interest of scholarship in the role of courts in developing democracies. However, the scholarship has neglected the existence of an earlier period when Argentina's courts enjoyed much greater authority than in recent times.<sup>7</sup> This Article will describe the constitutionalism that existed

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3. See generally Miller, *supra* note 2. Carlos F. Rosenkrantz, *Against Borrowings and other Nonauthoritative uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 270–77 (2003).

4. See CARLOS H. WAISMAN, REVERSAL OF DEVELOPMENT IN ARGENTINA: POSTWAR. COUNTERREVOLUTIONARY POLICIES AND THEIR STRUCTURAL CONSEQUENCES 6–7 (1987).

5. See JUAN BAUTISTA ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACION POLITICA DE LA REPUBLICA ARGENTINA (1852) reprinted in 3 OBRAS COMPLETAS 385, 408–10, 426–30, 438–42, 525–27 (1886) (emphasizing the importance of a Constitution that would encourage immigration, trade, and investment).

6. See generally William C. Banks & Alejandro D. Carrió, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1, 16–19, 25–42 (1993).

7. See generally REBECCA CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA (2004); GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2005); JODI S. FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S (2008); Matías Iaryczower, Pablo T. Spiller & Mariano Tommasi, *Judicial Independence in Unstable Environments, Argentina 1935–1998*, 46 AM. J. POL. SCI. 699 (2002); Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. 423 (1998); Catalina Smulovitz, *The Discovery of Law: Political Consequences in the Argentine Case*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW

during Argentina's institutionally more successful past—which, in the second half of the 19th century, was a borrowed constitutionalism that not only achieved many of the aims of its drafters, but also enjoyed increased legitimacy during its early decades precisely because it was borrowed.

While this Article will focus largely on legal history, it offers a contrast to comparative political science literature that focuses on judicial review as a product of political strategies.<sup>8</sup> Just in the Argentine context alone, books have fruitfully analyzed how Argentine courts will often act strategically,<sup>9</sup> examined the importance for judicial independence of dispersal of political power among a divided elite,<sup>10</sup> and discussed use of judicial review as insurance against future repression by a political opponent.<sup>11</sup> But those examinations of Argentina, while useful for a tactical understanding of specific historical moments, are secondary in the long term to the impact of international economic opportunity on Argentine institutions and the fashion in which the Argentine elite developed long-term responses to economic opportunities, and are almost irrelevant to Argentina's legislative debates about judicial review in the 1850s. The existing political science literature also fails to consider the unique characteristics of constitutionalism in economically and culturally dependent countries.

Legal historians have done excellent work highlighting the dichotomies between subaltern and elite practices during colonial and post-colonial periods<sup>12</sup>—an important part of law on the periphery

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LEGAL ORTHODOXY 249 (Yves Dezalay & Bryant G. Garth eds., 2002). The most extensive work published in Spanish has been by Jorge Bercholz. *See generally* JORGE BERCHOLZ, LA INDEPENDENCIA DE LA CORTE SUPREMA A TRAVÉS DEL CONTROL DE CONSTITUCIONALIDAD RESPECTO A LOS OTROS PODRES POLÍTICOS DEL ESTADO 1935–1998 (2004); JORGE BERCHOLZ & SEBASTIAN SANCARI, LA CORTE SUPREMA EN EL SISTEMA POLÍTICO (2006).

8. *See generally* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y REV. 117 (2001).

9. *See generally* GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2005); PABLO T. SPILLER & MARIANO TOMMASI, THE INSTITUTIONAL FOUNDATIONS OF PUBLIC POLICY IN ARGENTINA 122–57 (2007).

10. *See generally* REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA (2004).

11. *See generally* JODI S. FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S (2008).

12. *See generally* LAUREN A. BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY 1400–1900 (2002); RICARDO D. SALVATORE, WANDERING

given the influence of dominant foreign powers on local elites. But that dichotomy, while common to many developing countries, is not important for understanding the institutions that Argentina used to resolve political conflict. Especially from the 1850s through World War I, Argentine constitutionalism was largely the property of its elites, the only group with political strength. It was the constitutionalism of elites in a peripheral developing country with lucrative trading opportunities, whose constitutional framers and politicians recognized that they needed to create institutions to take advantage of trading opportunities and to ensure that the elite's power struggles would not affect business. The lower classes in the countryside, essential as mounted cavalry during the civil wars of the 1830s and '40s, progressively lost both political relevance and their sense of social class thereafter, as the market economy took hold and foreign immigration increased.<sup>13</sup> While Jeremy Adelman's book *Republic of Capital* focuses on the period leading up to the 1850s,<sup>14</sup> the title of his book captures the essence of Argentine constitutionalism.

This Article, which is part of a broader project on Argentine constitutional history, has only a modest goal. It will examine Argentina's legislative debates on judicial review during 1857–58 to consider the light they shed on Argentine adoption of judicial review. Three interesting characteristics emerge. First, it appears from the debates that at least some legislators had a very clear theoretical understanding of what judicial review involved and were therefore able to offer cogent critiques of the U.S. model. Second, debate over political theory does not win the day; what won was the prestige of the U.S. model and the sense that having copied Article III of the U.S. Constitution into the Argentine Constitution, Argentina had no choice but to copy U.S. judicial review. Third, at least in the case of Vicente Quesada, the leader of opposition to the U.S. model, positions in the debate were not driven by anticipation of present or future political advantage, but were probably intellectual in nature, and as such, proved easy to put aside once the elite united around the U.S. model.

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PAYSANOS: STATE ORDER AND SUBALTERN EXPERIENCE IN BUENOS AIRES DURING THE ROSAS ERA (2003).

13. SALVATORE, *supra* note 12, at 396–401.

14. *See generally* JEREMY ADELMAN, *REPUBLIC OF CAPITAL: BUENOS AIRES AND THE LEGAL TRANSFORMATION OF THE ATLANTIC WORLD* (1999).

## II. ARGENTINA'S ADOPTION OF U.S. JUDICIAL REVIEW

While much of the Argentine Constitution was borrowed from the U.S., Argentina's adoption of judicial review in the 1850s has more references to the U.S. than any other Argentine constitutional practice. Judicial review was not borrowed blindly. Argentine legislators conducted a fuller debate of the benefits and risks inherent in judicial review of Executive and Congressional action than had occurred in the U.S. up until that time.<sup>15</sup> Participants in the legislative debates even struggled with the difficult issue of the degree to which judges may interpret the Constitution as an autonomous body of law without reference to their personal perception of social needs. However, supporters of judicial review rarely moved beyond the arguments of their U.S. sources.

The Argentine Constitutional Conventions held in 1853 and 1860 came after more than forty years of civil wars and despotism. While Argentina began its independence in 1810, after Napoleon's conquest of Spain created the opening for Spain's colonies to free themselves of Spanish authority, eight years of subsequent battles to retain independence morphed into civil wars, as elites from the City of Buenos Aires tried to retain as much control as possible over the old Viceroyalty of the River Plate, and as local *caudillos* (essentially

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15. The United States never had the extended legislative debate on judicial review that one encounters in Argentina, and the arguments presented against judicial review in Argentina are much more developed than any discussion in the Anti-Federalist Papers, which primarily argue that judicial review will undercut the autonomy of the States and expand the powers of the federal government. Compare *Essays of Brutus*, in THE COMPLETE ANTI-FEDERALIST 358, 417-42 (Herbert J. Storing ed., 1981), with *infra* text accompanying notes 64-89, generally. The U.S. Constitutional Convention concerned itself mainly with federal judicial review of state legislation. See generally Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, in 1 THE OLIVER WENDELL HOLMES DEVISE. HISTORY OF THE SUPREME COURT OF THE UNITED STATES 204 (The Permanent Committee for the Oliver Wendell Holmes Devise ed., 1971) (reviewing the debates at the Constitutional Convention dealing with the judiciary). The question of judicial review of acts of Congress not only does not appear in the Constitution, but is also absent from both the text and Congressional debate of the U.S. Judiciary Act of 1789. See generally *id.* at 457-508 (reviewing the history of the drafting and passage of the Judiciary Act of 1789). The most important early defense of judicial review comes not in legislative debate, but in Alexander Hamilton's The Federalist No. 78. The U.S. had a strong historical background to support judicial review, with various examples of judicial review in state court systems, Goebel, *supra* note 15, at 125-42, and 17th-century English common law precedents like *Dr. Bonham's Case*, 8 CO. REP. 113B (1610) (holding that courts could hold an Act of Parliament void if in conflict with the common law). However, Alexander Hamilton's defense of judicial review in THE FEDERALIST NO. 78, is the only moderately thorough discussion of judicial review prior to the decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See also BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 40-43 (1993) (describing the role of *Marbury* in establishing judicial review).

warlords) vied for influence. In the City and Province of Buenos Aires, the *caudillo* Juan Manuel de Rosas exercised absolute power from 1829–32 and 1835–52. The forces that removed Rosas divided almost as soon as he was removed, so that Buenos Aires did not join the Constitution until 1860, after a second Convention that made limited amendments.<sup>16</sup>

The Constitutional Conventions shed little light on Argentine judicial review. The Constitutional Convention of 1853 adopted provisions similar to Article III of the U.S. Constitution practically without discussion.<sup>17</sup> The debates do not indicate whether, in adopting the U.S. Constitutional text establishing the federal courts, the delegates planned to allow judges to review the constitutionality of executive and legislative action.<sup>18</sup> Moreover, the only references to judicial review during the constitutional conventions held in 1860—to allow the Province of Buenos Aires to rejoin the nation—came in a passing comment by future president Domingo Sarmiento that "having adopted the organization of the federal Supreme Court of the United States we must adopt its attributions and its case law."<sup>19</sup> However, in 1857 and 1858, the Congress of the Argentine Confederation passed laws establishing a system of federal courts, and in the process, held a legislative debate on judicial review that

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16. DAVID ROCK, ARGENTINA 1516–1987: FROM SPANISH COLONIZATION TO ALFONSIN 79–124 (1987) (providing an overview of the 1810–60 period).

17. Constitutional convention of 1853, Session of Apr. 20, 1853, *in* 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, SEGUIDAS DE LOS TEXTOS CONSTITUCIONALES, LEGISLATIVOS Y PACTOS INTERPROVINCIALES QUE ORGANIZARON POLITICAMENTE LA NACIÓN; FUENTES SELECCIONADAS, COORDINADAS Y ANOTADAS EN CUMPLIMIENTO DE LA LEY 11.857 535 (Emilio Ravignani ed., 1937).

18. Article III of the U.S. Constitution does not explicitly address judicial review, but merely notes that federal court jurisdiction extends to all cases "arising under this Constitution, the Laws of the United States and Treaties." U.S. CONST. art. III, § 2.

19. *Sesiones de la Convención del Estado de Buenos Aires, Encargada del Examen de la Constitución Federal* [hereinafter *Buenos Aires Convention*], Session of May 7, 1860, *in* 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, SEGUIDAS DE LOS TEXTOS CONSTITUCIONALES, LEGISLATIVOS Y PACTOS INTERPROVINCIALES QUE ORGANIZARON POLITICAMENTE LA NACIÓN; FUENTES SELECCIONADAS, COORDINADAS Y ANOTADAS EN CUMPLIMIENTO DE LA LEY 11.857 870 (Emilio Ravignani ed., 1937) (statement of Sarmiento). The statement was made at a convention of the Province of Buenos Aires that proposed constitutional reforms to a national constitution convention held later that year that adopted most of its proposals so that Buenos Aires would rejoin the rest of the country. The Buenos Aires Convention also brought Argentine judicial practice closer to that of the U.S. by eliminating a requirement that the Supreme Court reside in the Capital, so that the Supreme Court judges could ride a circuit as in the United States, though the circuit riding never occurred in practice, and eliminated Supreme Court jurisdiction over disputes between branches of a provincial government and over ecclesiastical matters. *Id.* at 870–74.

shows that many legislators understood the political benefits and risks of judicial review under the U.S. model.

Unlike the U.S. Judiciary Act of 1789, the Argentine Confederation's 1858 law on the judiciary expressly provided for judicial review of unconstitutional legislation. Article 2 of the Argentine statute, hereafter referred to as the Confederation Judiciary Act, provided that the "Federal Courts will always proceed in accordance with the Constitution and national laws that are in conformity with it,"<sup>20</sup> and Article 3 provided that "the essential object of the Federal Judiciary is the enforcement of and compliance with the National Constitution in the contentious cases which occur, interpreting the laws uniformly in them and applying the law in accordance with the Constitution and nothing else."<sup>21</sup> These provisions were thought of as part of the constitutional package Argentina adopted from the U.S., and even Argentina's seminal political philosopher, Juan Bautista Alberdi, who generally opposed his contemporaries blindly copying the U.S. Constitution, acknowledged that Argentina had copied the U.S. system of judicial review when it copied Article III of the U.S. Constitution.<sup>22</sup> The Senate Committee, which initially studied the bill, took Alberdi's approach, arguing that the Constitutional Convention of 1853 copied Article III of the U.S. Constitution, and in doing so intended to copy the U.S. practice of establishing the judiciary as the guardian of the Constitution.<sup>23</sup> The Senate Committee indicated its work relied heavily on the U.S. Judiciary Act of 1789, Joseph Story's *Commentaries on the Constitution of the United States*, James Kent's *Commentaries on American Law* and Tocqueville's *Democracy in America*.<sup>24</sup>

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20. LEY DE 28 DE AGOSTO DE 1858, [1852–1880] A.D.L.A. 175, 175, promulgated Sept. 6, 1958. The Spanish original uses the subjunctive tense when referring to national laws—"that are in conformity" with the Constitution, further implying the possibility of national laws not in conformity with the Constitution that the courts will need to question. CONSTITUCIÓN NACIONAL [CONST. NAC.], art. II (Arg.) ("Los Tribunales Federales procederán siempre con arreglo á la Constitución y á las leyes nacionales que estén en conformidad con ella.").

21. *Id.* at art. III.

22. Juan Bautista Alberdi, *Sistema económico y rentístico de la Confederación Argentina según su Constitución de 1853*, in 4 OBRAS COMPLETAS 249 (LA TRIBUNA NACIONAL 1886).

23. CONGRESO FEDERAL DEL PARANÁ, CÁMARA DE SENADORES, ACTAS DE LAS SESIONES DE 1857 221 [hereinafter CONFEDERATION SENATE DEBATE] (Aug. 18, 1857) (statement of Senator Zapata).

24. *Id.* at 224.

However, the Senate Committee understood what it was doing when it copied the U.S. model. First, it wanted a federal judiciary able to provide uniform interpretation of the Constitution and federal law, to prevent each province from developing its own interpretation.<sup>25</sup> Second, it wanted the federal judiciary, and particularly the Supreme Court, to act as the "guarantor of all rights" and as a "powerful and constant moderator" of government power.<sup>26</sup> While this second role requires giving federal judges enormous political power, the Committee, tracking Tocqueville's arguments in *Democracy in America*, argued that this power would be limited by three distinctive characteristics of the judiciary: (1) the requirement that judges only decide cases between parties, not in the abstract; (2) the requirement that judges decide specific cases and not general principles; and (3) the rule that judges may only act passively, deciding legal issues when asked to do so, but not otherwise.<sup>27</sup> Moreover, Article 7 of the Confederation Judiciary Act enacted these three limitations into the law.<sup>28</sup>

Only one senator protested the enormous powers judicial review grants the federal judiciary. Senator Fernando Arias, a lawyer from the Province of Salta,<sup>29</sup> proposed an amendment to Article 2 to allow the judiciary to refuse to apply a law only when it is in "open opposition to the constitutional text."<sup>30</sup> He argued that the Supreme Court would undoubtedly occasionally make mistakes and lower court judges even more;<sup>31</sup> without the limiting language, judicial review could get out of hand. The bill's proponents offered two principal arguments in rebuttal. First, they emphasized the centrality of the judiciary as a power able to moderate and regulate the other powers. While the judiciary might err, it was a risk that had to be accepted to avoid awarding Congress and the Executive too much power.<sup>32</sup> Second, they emphasized the unobtrusive nature of judicial authority. Judges do not declare laws unconstitutional, but simply

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25. *Id.* at 221.

26. *Id.*

27. *Id.* at 222.

28. CONST. NAC., art. 7 ("The federal judiciary will never proceed on its own motion or exercise its jurisdiction except in contentious cases when it is required to at the request of a party."); LEY DE 28 DE AGOSTO DE 1858, art. 7, [1852–1880] A.D.L.A. 175, 175–76.

29. VINCENTE OSVALDO CUTOLO, NUEVO DICCIONARIO BIOGRÁFICO ARGENTINA 224 (1968).

30. CONFEDERATION SENATE DEBATE, *supra* note 23, at 225 (statement of Arias).

31. *Id.*

32. *Id.* at 225–26 (statements of Zapata and the Minister of Justice).

refuse to apply unconstitutional laws. Thus, the courts do not directly challenge the other branches of government, but merely refuse to act unconstitutionally within their own sphere.<sup>33</sup> Senator Arias' amendment was voted down, 17 to 1.<sup>34</sup>

Opposition to judicial review in the House of Deputies was led by Vicente Gregorio Quesada, a twenty-eight year old lawyer who represented the Province of Corrientes, and who later became a leading academician and diplomat, serving as ambassador to the United States from 1885–1992—a period that became a turning point for the worse in U.S. Argentine relations. His biography is interesting because there is nothing in his background that indicates why he chose such an outspoken position, or why in later years he would become far more critical of the U.S. than any Argentine of his generation. In the late 1880s he initiated an almost solitary attack on U.S. foreign policy until he was joined by figures over a generation younger than him. Born in 1830, his parents were Buenos Aires shop owners who likely supported Rosas, but the circle he associated with upon his graduation as a lawyer from the University of Buenos Aires in 1849 was part of the liberal movement that defeated Rosas, joined the infatuation with the U.S. model, and supported judicial review. After graduation he clerked for Benjamín Gorostiaga, who as a principal draftsman of the Constitution of 1853 had declared that Argentine federalism was in the mold of the U.S. When General Urquiza defeated Rosas both Gorostiaga and Quesada became part of the clique of legal talent that supported him. Urquiza was certainly infatuated by U.S. political institutions and often referred to George Washington as his model. Urquiza's son-in-law, future General and Supreme Court Justice Benjamín Victorica, would become a close friend, and Quesada's representation of Corrientes in Congress was thanks to a friendship he developed with the Governor, Juan Pujol, a liberal ally of Urquiza. Quesada's friendship with Pujol led to visits to the Province of Corrientes as the Governor's advisor and as a reporter, and to Quesada's first book, a description of the Province's geography, people and government.<sup>35</sup> Quesada would ultimately

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33. *Id.*

34. *Id.* at 227.

35. VICENTE G. QUESADA, *LA PROVINCIA DE CORRIENTES* (1857). On Quesada's life, see Alicia Vidaureta, *Vicente Gregorio Quesada*, 41 *Investigaciones y Ensayos* 457, 458–65 (1991) (offering a good overview of Quesada's early career); Paulo Cavaleri, *LA RESTAURACIÓN DEL VIRREINATO: ORÍGENES DEL NACIONALISMO TERRITORIAL ARGENTINO* 73–103 (describing Quesada's career and writings through the 1980s with emphasis on his

publish over 30 books, primarily on history, diplomacy, and the places he visited in his travels. There was no economic interest group or political faction in Argentina during this time period that aligned itself against judicial review or had particular incentives to do so.

Judicial review received much more scrutiny in the House of Deputies, the Argentine equivalent of the U.S. House of Representatives, than in the Senate. The debate over Article 2 lasted nearly two full days and by the end of the debate every member of the House must have understood the principal risks as well as the benefits of judicial review. The Deputies voted 20 to 9 in favor of passage<sup>36</sup>—but the lopsided vote is not a reflection of who did a better job in the debate. Quesada was simply brilliant. The debate focused entirely on judicial review of acts of Congress. The absence of any discussion of federal judicial review of provincial legislation implies that even those opposing judicial review of Congressional action accepted judicial review of provincial action. Regarding acts of Congress, however, Quesada and his allies presented arguments that remain common today in law school classrooms.

Quesada did not offer the source of his arguments and some may have been original. While French culture exercised enormous influence in Argentina in the 19th century, France influenced the Argentine constitutional model far less than the U.S. France and French thinkers are never cited during the debate, with the exception of Tocqueville who is cited for his observations on the U.S.<sup>37</sup> This "oversight" by Quesada was significant, since the Argentine Constitution did provide for the drafting of a national civil code,<sup>38</sup> and Continental European influence on Argentina's 1868 Civil Code and in turn on Argentine legal education and legal reasoning would become enormous.<sup>39</sup> Failure of Quesada and his allies to mention the

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work as foreshadowing Argentine nationalism); JOAQUÍN EFEN MEABE, *CORRIENTES EN 1855* 25–32 (describing Quesada's work in *Corrientes*); Vicente Osvaldo Cutolo, 5 *NUEVO DICCIONARIO BIOGRÁFICO ARGENTINO 1750–1930* 642–43 (1978); *DICCIONARIO HISTÓRICO ARGENTINO* 8–10 (Piccirilli, Romay, & Gianello, eds., 1954).

36. CONGRESO NACIONAL, *ACTAS DE LAS SESIONES DE LA CÁMARA DE DIPUTADOS, 1857–1858* [hereinafter *CONFEDERATION HOUSE DEBATE*], Sessions of July 12 & 14, 1858 at 504–29. The vote on art. 2 is at 529.

37. *CONFEDERATION SENATE DEBATE*, *supra* note 23, at 223–24 (statement of Zapata on August 18, 1857); *id.* at 528 (statement of the Ministro de Justicia del Cantillo on July 14, 1858); *id.* at 514 (statement of Funes on July 13, 1858).

38. CONST. NAC. 1860 (Arg.) art. 67, §11.

39. VICTOR TAU ANZOÁTGUI, *LA CODIFICACIÓN EN LA ARGENTINA 1810–1870: MENTALIDAD SOCIAL E IDEAS JURÍDICAS* 28–29, 359 (1977); ABEL CHÁNETON, 2 *HISTORIA*

French's vehement opposition to judicial review may indicate that France, with its 19th century lurches between republican revolution and monarchy, lacked the prestige on issues of government organization to influence the debate. In the 1850s it was only an influence in the civil law sphere.

Quesada and his allies emphasized that judicial review undercuts Congress even though Congress is the best interpreter of the Constitution. Judicial review "implies admitting the infallibility of the members of the Federal Tribunal and assumes that the Congress and the Executive will engage in unconstitutional conduct."<sup>40</sup> When Congress passes a law and the Executive signs it, both these branches have passed on its constitutionality.<sup>41</sup> Judicial review makes the Judiciary a "co-legislator,"<sup>42</sup> or worse, makes the Legislature subordinate to the Judiciary.<sup>43</sup> Congress has natural restraints on its conduct. "[T]he periodic renewal of the body, its organization, the mechanisms observed for passing laws, [and] the veto given to the Executive Branch, are sufficient guarantees that when the majority passes a law, that law must be legally and constitutionally respected and therefore followed."<sup>44</sup> Particularly since the Constitution "only established the grand principles"—which as such, offer room for varied interpretations—there was no reason to think that a Court would do a better job at constitutional interpretation than Congress.<sup>45</sup> Since Congress responds to its constituents, it properly responds to the necessities of the times in interpreting constitutional principles.<sup>46</sup> Moreover it conducts its debates in the open, with the opposition receiving the opportunity to express itself, and with all of its work subject to the scrutiny of the Press and public opinion.<sup>47</sup>

Compared to Congress, the judiciary is unstable. Judicial review places enormous powers in a small number of persons, whom unlike the legislature, cannot be voted out of office and do not conduct their debates in public.<sup>48</sup> Unlike Congress, the Supreme Court is not a

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DEL VÉLEZ SÁRSFIELD §250 (1937).

40. CONFEDERATION HOUSE DEBATE, *supra* note 36, at 526 (statement of García).

41. *Id.* at 512, 518 (statements of Gonzalez).

42. *Id.* at 518 (statement of Gonzalez).

43. *Id.* at 526 (statement of García).

44. *Id.* at 510 (statement of Quesada).

45. *Id.* at 514 (statement of Quesada).

46. *Id.* at 523 (statement of Quesada).

47. *Id.*

48. *Id.* at 510–11 (statement of Quesada).

creature of the popular will, so it cannot possibly do a better job than Congress of interpreting what in practice are very general principles.<sup>49</sup> Judges will decide cases according to their personal political philosophy, and that philosophy may well differ from that of Congress.<sup>50</sup> When judges assert that they are "giving the true interpretation of the law" using their "wisdom" and "their science," there is no one in a position to question them.<sup>51</sup> Moreover, the Judiciary can be subject to party passions and interests. Even Tocqueville recognized the danger of imprudent judges, noting that the day that judges act arbitrarily the Union will find itself in danger.<sup>52</sup>

Quesada also emphasized that the U.S. did not offer a good model for the role of the judiciary. Simply citing the U.S. was not sufficient, since Argentina differed in important ways. First, Argentina, under its 1853 Constitution, had adopted a more centralized form of government than the U.S., and hence had less need for the Supreme Court to resolve disputes between the federal government and the provinces.<sup>53</sup> Further, the U.S. came from the British tradition of strong parliaments and therefore had a correspondingly greater need to restrict the power of Congress than Argentina.<sup>54</sup> Quesada questioned the growing addiction to everything American as the secret to prosperity. "To say that the prosperity of the United States depends on the organization of its Judiciary is as absurd as saying that slavery is the source of Brazil's prosperity and power. Other factors have raised the North Americans to their present heights, not the organization of the Federal Judiciary."<sup>55</sup> If judicial review was so useful, then other countries should have adopted it besides just the U.S.<sup>56</sup> He challenged proponents of judicial review to provide specific examples of how the Judiciary had helped the U.S.<sup>57</sup>

Quesada also argued that the general nature of constitutional principles meant judicial review undercuts legal certainty. Legal certainty required that the parties "know beforehand in all cases that

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49. *Id.* at 514 (statement of Quesada).

50. *Id.* at 512 (statement of Gonzalez).

51. *Id.* at 514 (statement of Quesada).

52. *Id.* at 511 (statement of Quesada, referring to Tocqueville).

53. *Id.* at 509, 511 (statements of Quesada).

54. *Id.* at 515 (statement of Quesada).

55. *Id.* at 524 (statement of Quesada).

56. *Id.* at 514, 515 (statements of Quesada).

57. *Id.* at 523 (statement of Quesada).

the Judiciary will always follow the written law."<sup>58</sup> Since many issues can be decided either for or against constitutionality, the validity of laws would become uncertain,<sup>59</sup> particularly when judges allow themselves to be guided by their conscience instead of the norms written by the legislature.<sup>60</sup> Parties would pick laws apart in search of grounds for constitutional attacks,<sup>61</sup> and the truly injured would be citizens who rely on legislation later found unconstitutional.<sup>62</sup>

In sum, not only did Quesada and his allies identify many of the tensions inherent in judicial review, but they questioned the two central features which would come to underlie judicial authority: the need to follow the U.S. model, and the view that the Constitution may be interpreted as autonomous law without reference to concerns outside its text and its Framers' intent. According to Quesada, the U.S. model would fail in Argentina because the U.S. was too different from Argentina to offer a model for the judiciary. Textual interpretation would fail because the Constitution only elaborates general principles and is therefore best interpreted by a body responsive to public needs, like the Congress. These are also the criticisms which the proponents of judicial review attacked most sharply in turn.

As in the Senate, proponents of judicial review maintained that Argentina could not reject a basic element of the U.S. political model that it adopted when it adopted its Constitution.<sup>63</sup> Speaking with authority as one of the key drafters of the 1853 Constitution, José María Gutiérrez, now a Deputy, insisted "that the Judicial Branch as it has been established in our Constitution is an exact copy of the

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58. *Id.* at 511 (statement of Quesada).

59. *Id.* at 513 (statement of Gonzalez).

60. *Id.* at 516 (statement of García).

61. *Id.* at 514 (statement of Quesada).

62. *Id.* at 526 (statement of García). One of Quesada's allies goes even further and argues that judicial review itself is unconstitutional. He argues that CONST. NAC., art. 97 merely states that federal judges may exercise jurisdiction "in all cases dealing with questions governed by the Constitution, by the laws of the Confederation, and by treaties with foreign nations"; it does not say that judges may refuse to apply "laws." The Constitution's instruction that judges must apply "the laws" therefore requires respect for the laws as enacted by Congress, with Congress' decision on constitutionality upon passing "the laws" binding the courts. CONFEDERATION HOUSE DEBATE, *supra* note 36, at 515-16 (statement of García). Of course since Article 97 tracks the language of Article III of the U.S. Constitution, if this argument were valid judicial review in the U.S. would be unconstitutional as well.

63. *Id.* at 529 (statement of Alvear).

Judicial Branch of the United States,"<sup>64</sup> and that "[w]e could do no less than accept this power in the North American sense from the moment we decided to give our government the same form as that one."<sup>65</sup> The Minister of Justice, who participated in the debate, argued that observers had consistently noted the importance of judicial review for the U.S. system of government.<sup>66</sup> Two Deputies added that when Tocqueville identified the risk to the United States should arbitrary judges dominate the courts, he did so only because he was so impressed by the vital function the judiciary performed in the U.S.<sup>67</sup>

The proponents of judicial review did not respond to Quesada's challenge to offer specific examples of how the United States had benefited from judicial review. Quesada might have further strengthened his argument by citing the unpopular decision of *Dred Scott v. Sanford*,<sup>68</sup> decided the year before, where the U.S. Supreme Court held that African Americans were not persons entitled to sue in Federal court and that Congress could not bar slavery from federal territories because it had no right to deprive a citizen of his property. None of the Deputies seemed aware of the decision or appear aware that as of the date of their debate, *Dred Scott* and *Marbury v. Madison*<sup>69</sup> were the only two decisions in which the U.S. Supreme Court had ruled acts of Congress unconstitutional. Story, Kent, and Tocqueville, the key authors in the Deputies' possession, ignored this anomaly, and Alberdi, the most widely read Argentine author on public law issues, shared the Deputies' false impression that many federal laws in the United States had been found unconstitutional by the Supreme Court and subsequently were reformed by Congress.<sup>70</sup> Without realizing it, the Deputies were debating a model that had been used in the United States primarily to declare state legislation unconstitutional. Judicial decisions declaring federal legislation unconstitutional would only become more frequent in the United States in the last third of the 19th century.

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64. *Id.* at 522 (statement of Gutierrez).

65. *Id.* at 523 (statement of Gutierrez). *See also id.* at 519 (statement of Zuviria, saying essentially the same thing as Gutierrez).

66. *Id.* at 512 (statement of Ministro de Justicia del Cantillo).

67. *Id.* at 514 (statement of Funes); *id.* at 528 (statement of Alvear); *id.* at 527 (statement of Alvear).

68. 60 U.S. 393 (1856) (decided March 6, 1857).

69. 5 U.S. 137 (1803).

70. Alberdi, *supra* note 22, at 249.

The proponents of judicial review insisted that their arguments came from the United States, and several of their arguments can be traced to Alexander Hamilton's defense of judicial review in The Federalist No. 78, which was published in the Paraná newspaper *El Nacional Argentino* during the debates.<sup>71</sup> The proponents of judicial review did not go to the extremes of French legal rationality and insist that judges were mere technicians mechanically producing answers dictated by the Constitution. They were not individuals trained in the French tradition of textual exegesis,<sup>72</sup> and they recognized that judges could not interpret the Constitution with mathematical certainty.<sup>73</sup> But they sharply responded to their opponents' contention that Congress was a superior constitutional interpreter because it responded to popular concerns. They emphasized that the judiciary is the most reliable branch for constitutional interpretation precisely because it is the most removed from political pressures. The judiciary "has no need like the other [branches] to adulate public opinion, because its members enjoyed life tenure."<sup>74</sup> Unlike Congress, it would not "temporize with the preoccupations of the moment"<sup>75</sup> at the expense of the Constitution.<sup>76</sup> Further, the Constitution called for the judiciary to decide cases under the Constitution, and the judiciary cannot do that unless it interprets the Constitution and refuses to apply inconsistent laws.<sup>77</sup> An unconstitutional law "should be thought of as non-existent" because there was no authority to enact it.<sup>78</sup> The judiciary proceeds according to law, and "only laws which are completely constitutional are considered laws of the Confederation."<sup>79</sup>

The above arguments track the arguments of The Federalist No. 78, as did repeated arguments that the judiciary is the least dangerous

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71. See Beatriz Bosch, *El Poder Judicial de la Confederación Argentina*, in 15 REVISTA DEL INSTITUTO DE HISTORIA DEL DERECHO "RICARDO LEVENE" 11, 32 (1964).

72. French exegesis only became widely accepted with the promulgation of the Civil Code in the 1860s. Abelardo Levaggi, *La Interpretación del Derecho en la Argentina en el Siglo XIX*, 7 REVISTA DE HISTORIA DEL DERECHO 23, 76, 78 (1980); Miller, *supra* note 2, at 104–10.

73. CONFEDERATION HOUSE DEBATE, *supra* note 36, at 514 (statement of Funes).

74. *Id.* at 517 (statement of Alvear).

75. *Id.* at 518 (statement of Alvear).

76. *Id.* at 517–18 (statement of Alvear). See also *id.* at 514 (statement of Funes).

77. *Id.* at 520 (statement of Ministro de Justicia del Cantillo); *id.* at 521 (statement of Araoz).

78. Compare *id.* at 513 (statement of Ministro de Justicia del Cantillo), with THE FEDERALIST NO. 78 ¶ 11 (Alexander Hamilton) ("[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.").

79. CONFEDERATION HOUSE DEBATE, *supra* note 36, at 519 (statement of Navarro).

of the three branches of government and that all three branches are equally bound by the Constitution. As in *The Federalist* No. 78, the pro-judicial review Deputies emphasized that there is no need to fear the judiciary, because it lacks the "physical force" of the Executive and unlike Congress, would not be interpreting its own laws.<sup>80</sup> The judiciary depends on "its reason and its independence" for its authority.<sup>81</sup> It cannot even derogate a law, but merely may refuse to apply it in the case at hand.<sup>82</sup> Further, since the courts can only apply the Constitution at the request of a party, in concrete, individual litigations, there is little risk of abuse of authority,<sup>83</sup> and Congress can respond to abuses with impeachment proceedings.<sup>84</sup> Unlike the courts, Congress is dangerous because it can initiate action and draft unconstitutional laws,<sup>85</sup> and the Executive has the physical force to act in disregard of the Constitution and usurp the powers of the other branches of government.<sup>86</sup> Although less original in their arguments, the proponents of judicial review recited the political principles underlying judicial review and inevitably placed more emphasis than their opponents on constitutional decision making as an objective exercise—an exercise which the judiciary was well suited to engage in precisely because of its capacity for objective legal analysis. The central thrust of the proponents, however, comes with José María Gutierrez' emphasis on judicial review as a central part of the package that Argentina adopted in 1853, when it copied Article III of the U.S. Constitution into its own.

Lack of funds and lack of lawyers made it impossible for the Argentine Confederation to live up to the promise of the Confederation Judiciary Act.<sup>87</sup> The period from 1853 to 1860 was one of low-intensity civil war between the Argentine Confederation, which included all of the Argentine provinces except Buenos Aires,

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80. Compare *id.* at 509 (statement of Funes), with *THE FEDERALIST* NO. 78 ¶ 7 (Alexander Hamilton) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in capacity to annoy or injure them.").

81. CONFEDERATION HOUSE DEBATE, *supra* note 36, at 519 (statement of Gutierrez).

82. *Id.* at 519 (statement of Navarro); *id.* at 523 (statement of Gutierrez).

83. *Id.* at 509 (statement of Funes); *id.* at 513 (statement of Ministro de Justicia del Cantillo); *id.* at 521 (statement of Araoz).

84. *Id.* at 522 (statement of Araoz).

85. *Id.* at 511 (statement of Funes).

86. *Id.* at 509 (statement of Funes).

87. CLODOMIRO ZAVALÍA, HISTORIA DE LA CORTE SUPREMA DE JUSTICIA DE LA REPÚBLICA ARGENTINA 63 (1920).

and the Province of Buenos Aires, which included the port of the City of Buenos Aires and therefore enjoyed customs revenues that placed it in a superior financial position. While the Confederation appointed Supreme Court judges, they never assumed office.<sup>88</sup> A judiciary as envisioned by the Confederation legislators only became reality once Buenos Aires defeated the Confederation and united the country, providing the nation with the funds from the Buenos Aires Customs House and the law graduates from its university. However, the 1858 debate over the Confederation Judiciary Act shows that while dependent on the U.S. for a model, judicial review did not enter Argentine practice without consideration.

Debates and legislation on the judiciary in 1862 and 1863, after national unification, also focused closely on the U.S. model. First, Law 27, passed in October 1862, established a federal court system with a five-member Supreme Court<sup>89</sup> and at least one federal district court in each Province.<sup>90</sup> It included provisions on judicial review similar to the Confederation Judiciary Act. The law entrusted the judiciary with "the observance of the national Constitution, avoiding applying in its decisions any disposition of any of the other branches of the national [government] which might be in opposition with it,"<sup>91</sup> but balanced this with the requirement that the Judiciary must "[n]ever proceed on its own motion, and must only exercise jurisdiction in controversial cases between parties, in which it is requested to do so by a party."<sup>92</sup> These provisions passed both the Senate and the House of Deputies without debate, probably because, as the Committee Report noted, it was recognized that Argentina had copied Article III of the U.S. Constitution word for word.<sup>93</sup>

But the U.S. model was even more central the following year,

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88. *Id.* at 50–52. The only functioning Confederation judiciary was a Court of Appeals established in the City of Paraná, which heard local matters while Paraná was temporarily the federal capital, and both the City of Paraná and the surrounding Province of Entre Ríos were temporarily federalized. CARLOS ALBERTO SILVA, 6 EL PODER LEGISLATIVO DE LA NACIÓN ARGENTINA 9–10 (1950).

89. Ley 27, art. 14, OCT. 16, 1862, [1852–1880] A.D.L.A. 354, 355. The law also lists the *Procurador General*, an attorney who represents the State's interest in litigations before the Supreme Court, as though he were a member of the Court. *Id.*

90. *Id.* art. 14, at 355.

91. *Id.* art. 3, at 354.

92. *Id.* art. 2, at 354.

93. CONGRESO NACIONAL, CÁMARA DE SENADORES, DIARIO DE SESIONES DE 1862, Session of Aug. 28, 1862, at 425–26 (Committee Report). The report also notes the need to translate and compile manuals on U.S. judicial procedure. *Id.*

when Congress debated Law 48,<sup>94</sup> establishing the first instance and appellate jurisdiction of the federal courts. The Supreme Court itself drafted Law 48,<sup>95</sup> and Congress debated and approved its draft, with changes, between June and August 1863.<sup>96</sup> The drafters almost always followed the U.S. Judiciary Act of 1789 and their understanding of U.S. procedural practice,<sup>97</sup> establishing Supreme Court appellate jurisdiction over most questions of federal law.<sup>98</sup>

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94. LEY 48, Sept. 14, 1863 [1852–1880] A.D.L.A 364.

95. See CONGRESO NACIONAL, CÁMARA DE SENADORES, DIARIO DE SESIONES DE 1863, Session of June 27, 1863, at 203 (statement by Minister of Justice Eduardo Costa); CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1863, Session of Aug. 3, 1863, at 321 (statement of Ruiz Moreno); ZAVALÍA, *supra* note 87, at 61–62, 78.

96. CONGRESO NACIONAL, CÁMARA DE SENADORES, DIARIO DE SESIONES DE 1863, Sessions of June 27, 30, July 2, Aug. 25, 1863 [hereinafter *Senate Debate-LEY 48*], at 199–224, 453–59; CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1863, Sessions of July 31, Aug. 3, 5 [hereinafter *House Debate-LEY 48*], at 301–54.

97. See NÉSTOR PEDRO SAGÜÉS, 1 DERECHO PROCESAL CONSTITUCIONAL: RECURSO EXTRAORDINARIO 245, 256–57, 257 n.3 (3d ed. 1992).

98. Lower court federal jurisdiction, as in the U.S., included cases invoking the Constitution, federal law, treaties or administrative acts of the federal government, diversity jurisdiction (where the parties are residents of different provinces or where one party is an Argentine citizen and the other a foreigner), cases where the federal government is a party, federal crimes and admiralty cases. Compare LEY 48, *supra* note 94, at arts. 2, 3, with U.S. Judiciary Act of 1789, §9. Supreme Court appellate jurisdiction tracked the Judiciary Act of 1789 to include ordinary appeals of any case decided by the federal district courts (with a minimum value in civil cases of 200 pesos), LEY 48, *supra* note 94, at art. 4, and appeals from provincial supreme courts in three situations:

- i) when a case puts at issue the validity of a Treaty, federal law or action undertaken under color of federal law authority and the provincial court held against the validity of the Treaty, law or authority;
- ii) when the validity of a provincial law, decree or act has been questioned as unconstitutional or contrary to a Treaty or federal law, and the provincial court decides in favor of the validity of the provincial measure; and
- iii) when a party invokes a Constitutional clause, a Treaty, a law, or a grant of federal authority and the provincial court decides against the norm or privilege invoked.

LEY 48, *supra* note 94, at art. 14. Compare *id.*, with U.S. Judiciary Act of 1789, §13.

In addition, the Supreme Court was explicitly barred from hearing appeals invoking the national, civil, criminal, commercial or mining codes, LEY 48, *supra* note 94, at art. 15, since under the Constitution, the codes do not constitute federal law for the purpose of federal jurisdiction. CONST. NAC., art. 67, §11, art. 100. This also parallels U.S. practice, where because state law governs private law matters, they are usually heard in the state courts. While in Argentina, the Codes governing ordinary civil and criminal matters are national, to match the U.S. jurisdictional practice, cases brought under these codes generally remain subject only to provincial jurisdiction.

There are two important differences from U.S. practice, however, both of which were likely based on distrust of provincial courts, though no explanation is given. First, LEY 48 makes federal jurisdiction largely exclusive of provincial jurisdiction, with provincial courts barred from hearing most federal questions. LEY 48, *supra* note 94, at art. 12. Compare *id.*,

Legislators focused their most important discussions on determining the precise nature of U.S. practice,<sup>99</sup> and the question of the role of the judiciary vis-à-vis the other branches of government only arose once, during a debate on the issue of sovereign immunity--the immunity of the government from suits by individuals seeking damages. Here, because there was a tension between what many delegates felt was the essence of U.S. judicial review, protection of the individual from arbitrary government conduct, and actual U.S. practice of extensive sovereign immunity, the issue was debated and then left unresolved.<sup>100</sup>

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with U.S. Judiciary Act of 1789, §9. Second, unlike U.S. practice at that time, Supreme Court original jurisdiction (cases where the Supreme Court hears cases as a court of first instance) included more than just cases concerning Ambassadors, and disputes between Provinces, and disputes between Provinces and a foreign state. Rather, both the Argentine Constitution and LEY 48 followed U.S. practice as true before U.S. ratification of the 11th Amendment in 1798, with jurisdiction including cases between a province and a resident of a different province and cases between a province and a foreigner. Compare LEY 48, *supra* note 94, at art. 1, with U.S. Const. amend. XI.

99. See *Senate Debate-LEY 48*, *supra* note 96, at 207–09 (statements of Navarro and Alsina) (debating the original jurisdiction of the Argentine Supreme Court when a Province is a party and whether there was reason to think that the U.S. Constitution varies on this issue); LEY 48, *supra* note 94, at 307–08, 313–15, 318–22, 328, 329 (statements of Gorostiaga, García, Obligado, Quintana, Ruiz Moreno, Vélez) (debating sovereign immunity and the extent to which U.S. practice blocked actions against the state); *id.* at 344–47 (statements of Gorostiaga, Quintana and Vélez) (debating the original versus appellate jurisdiction of the Supreme Court when a Province is a party in light of U.S. practice).

100. Many deputies wished to allow actions against the federal government in spite of the fact that U.S. courts usually barred such actions. Arguing against sovereign immunity, deputies emphasized that political pressures in Congress meant that it would not always act in a balanced manner, *id.* at 310 (statements of Mármol); that life tenure gave judges necessary independence, *id.* at 372 (statement of Quintana); that each branch of government acted in its realm and the realm of the judiciary included reparation of injuries regardless of the defendant, *id.* at 313 (statements of Zavalía and Vélez); that many U.S. scholars opposed the doctrine of sovereign immunity, *id.* at 321, 323 (statements of Ruiz Moreno); and that sovereign immunity in the U.S. emerged from concerns by the states that they not be sued in federal court—a federal-state rivalry which did not exist in Argentina, *id.* at 314–15 (statement of García). However, the Minister of Justice naturally invoked the U.S. model. “[G]iven that we have imitated the U.S. Constitution, that we have copied it almost textually, we cannot pretend. . . to be more Catholic than the Pope.” *Id.* at 329 (statement of Ministro de Culto, Justicia e Instrucción Pública Eduardo Costa). See also, *e.g.*, *id.* at 307–08 (statement of Gorostiaga); *id.* at 318 (statement of Obligado) (arguing that Argentina needed to follow U.S. practice on sovereign immunity, since the U.S. was its constitutional model). Proponents of sovereign immunity also emphasized the need to restrain the Judiciary when its decisions could affect the democratically elected branches, *House Debate-LEY 48*, *supra* note 96, at 310 (statement of Elizalde); *id.* at 311–12 (statement of Ministro de Justicia, Culto y Instrucción Pública Eduardo Costa); that judges will not respond to societal needs and will seek to dominate the branches of government which do, *id.* at 318–19 (statement of Obligado); and that Congress could provide adequate compensation to affected individuals itself, *id.* at 310 (statement of Elizalde); *id.* at 333 (statement of Cabral). All the Deputies recognized that allowing courts to

Congress and the Executive also financed a study of U.S. judicial review and the U.S. Constitution generally. Prior to the drafting of Laws 27 and 48, the government sent an attorney to the U.S. to study its procedural system first hand.<sup>101</sup> In 1863, Congress underwrote publication of a translation of Story's *Commentaries* through an advance purchase.<sup>102</sup> In 1864, it did the same in the case of James Kent's *Commentaries on American Law*,<sup>103</sup> and in 1869, President Sarmiento, in a decree later approved by Congress as a law, authorized translations of William Whiting's *War Power under the Constitution of the United States*, John Norton Pomeroy's *An Introduction to the Constitutional Law of the United States* (1868), George Paschal's annotated *The Constitution of the United States*, Luther S. Cushing's *Rules of Proceeding and Debate in Deliberative Assemblies* (1868), and Francis Lieber's *Civil Liberty and Self-Government* (1859).<sup>104</sup> The translators appointed included a future Supreme Court Justice, Luis Varela, a future President, Carlos

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require the government to make a payment to an individual meant an important limitation on the powers of Congress and the Executive. *See id.* at 305–06 (statement of García); *id.* at 306 (statement of Zavalía); *id.* at 326 (statement of Elizalde). In the end the House passed language simply tracking the language of the Constitution, which provides for federal jurisdiction whenever “the Nation might be a party.” CONST. NAC. art. 100. *Compare id.*, with LEY 48, art. 2 § 6, 1852–1880 A.D.L.A. 364. *See also House Debate-LEY 48*, *supra* note 96, at 338 (statement of García). The Argentine Supreme Court in *Gomez c/Nación Argentina*, 2 FALLOS 36 (1865), then took the position that Congress had left the issue of sovereign immunity to the discretion of the courts and ruled in favor of sovereign immunity. *Id.* at 43. There is some support for the position taken by the Supreme Court that the House vote to track the Constitutional text was a vote to leave the matter in the Supreme Court's hands and was therefore not a vote to allow actions against the federal government, but the intent of Congress is simply unclear. *See House Debate-LEY 48*, *supra* note 96, at 311, 334 (statements by Mármol). Given that the Court authored the original version of the statute, which provided for sovereign immunity, the Court's preference for sovereign immunity once a case came before it is no surprise.

101. *Justicia Federal*, LA NACIÓN ARGENTINA, Feb. 6, 1863, at 2. The study appears as a book by MANUEL RAFAEL GARCÍA, entitled ESTUDIOS SOBRE LA APLICACIÓN DE LA JUSTICIA FEDERAL NORTE AMERICANA A LA ORGANIZACIÓN CONSTITUCIONAL ARGENTINA (1863). *See also* HECTOR JOSÈ TANZI, EL PODER JUDICIAL EN LA PRESIDENCIA DE MITRE, 17 HISTORIA 67, 80, 91 n.21 (1997) (describing the works published by Manuel Rafael García as a result of his trip).

102. Law of Sept. 16, 1863, 5 REGISTRO OFICIAL DE LA REPÚBLICA ARGENTINA 73 (1884).

103. Law of Oct. 1, 1864, 5 REGISTRO OFICIAL DE LA REPÚBLICA ARGENTINA 160 (1884).

104. Decree of Mar. 2, 1869, 5 REGISTRO OFICIAL DE LA REPÚBLICA ARGENTINA 449 (1884); LEY 375, 3 LEYES NACIONALES 120, sanctioned on June 17, 1870. *See also* Alberto F. Garay, *Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A comparison with the U.S. Constitutional Model*, 22 INTER-AM. L. REV. 161, 175 n.100 (1991).

Pellegrini, and Argentina's leading female educator, Juana Manso.<sup>105</sup>

Even though it was alien to Argentine tradition, judicial review was seen as a panacea to conflict. President Bartolomé Mitre and his Minister of Justice would constantly refer to the Court as "a moderating power" in speeches to Congress and messages to the Governors.<sup>106</sup> *La Nación Argentina*, the leading morning newspaper, welcomed the naming of judges to the Supreme Court with abundant quotes from Tocqueville, and described the Court as "a force of equilibrium for the power of Congress, the National Executive, and those same branches of Provincial government," reducing disputes between government authorities "to the conditions of a common lawsuit," and offering "the primordial guarantee for the Constitution."<sup>107</sup> Even before the Supreme Court had handed down its first decision, *La Nación Argentina* and its rival *La Tribuna* held an extensive debate in 1863 over whether the Province of Buenos Aires could bring an action against the federal government for improperly establishing a federal real estate tax for the City of Buenos Aires.<sup>108</sup> At this time the City, while temporarily federalized, had not

105. Decree of Mar. 2, 1869, *supra* note 104. It is likely that some of these translations were never completed. Juana Manso completed her assignment, translating FRANCISCO LIEBER, *SOBRE LA LIBERTAD CIVIL Y EL PROPIO GOBIERNO* (Juana Manso trans., 1869). Other books that were likely underwritten by the government include: JAMES KENT, *DEL GOBIERNO Y JURISPRUDENCIA CONSTITUCIONAL DE LOS ESTADOS UNIDOS* (Alejandro Carrasco Albano trans., 1865); GEORGE TICKNOR CURTIS, *HISTORIA DEL ORIGEN, LA FORMACIÓN Y LA ADOPCIÓN DE LOS ESTADOS UNIDOS* (J.M. Cantilo trans., 1866). One study has recently listed seventeen different translations of U.S. Constitutional Law book published in Argentina during the second-half of the 19th century. MARTA MARÍA MAGDALENA HUERTAS, *EL MODELO CONSTITUCIONAL NORTEAMERICANO EN LOS FALLOS DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN 1863–1903* 173–75 (2001). *See also* Eduardo Zimmerman, *The Education of Lawyers and Judges in Argentina's Organización Nacional*, in *JUDICIAL INSTITUTIONS IN NINETEENTH-CENTURY LATIN AMERICA* 104 (Eduardo Zimmerman ed., 1999) (describing some of the Argentine scholarship based on the U.S. model).

106. TANZI, *supra* note 101, at 90, 112.

107. *La corte federal*, LA NACIÓN ARGENTINA, Oct. 24, 1862, at 1.

108. *Argumentos pobrísimos*, LA TRIBUNA NACIONAL, Oct. 6, 1863, at 2; *La Corte Supreme es competente*, LA TRIBUNA NACIONAL, Oct. 7, 1863 at 2; *Jurisdicción*, LA TRIBUNA NACIONAL, Oct. 8, 1863, at 2; *Cuestión importante*, LA TRIBUNA NACIONAL, Oct. 9, 1863, at 2; *Lógica de fierro*, LA TRIBUNA NACIONAL, Oct. 10, 1862 at 2; *La elocuencia de los hechos*, LA TRIBUNA NACIONAL, Oct. 15, 1863, at 2; *Niegan la luz*, LA TRIBUNA NACIONAL, Oct. 17, 1862, at 2; *La interpretaciones en la práctica*, LA TRIBUNA NACIONAL, Oct. 18, 1862, at 2; *Justicia federal*, LA NACIÓN ARGENTINA, Oct. 7, 1863, at 1; *Story y la jurisdicción de la corte federal*, LA NACIÓN ARGENTINA, Oct. 8, 1863, at 1; *Justicia federal*, LA NACIÓN ARGENTINA, Oct. 9, 1863, at 1; *Confesión paladina*, LA NACIÓN ARGENTINA, Oct. 9, 1863; *El caso, según Story*, LA NACIÓN ARGENTINA, Oct. 9, 1863; *Objeciones*, LA NACIÓN ARGENTINA, Oct. 10, 1863, at 1; *Mas claro*, LA NACIÓN ARGENTINA, Oct. 11, 1863, at 1; *La autoridad de Curtis*, LA NACIÓN ARGENTINA, Oct. 13, 1863, at 1; *La nota del president Lincoln y la jurisdicción del*

been permanently ceded by the Province to the Federal government.<sup>109</sup> Most of the debate was framed by dueling quotations from U.S. authorities. *La Nación Argentina*, arguing that an action can only be brought when an individual has suffered some harm, cited Story,<sup>110</sup> Kent,<sup>111</sup> and Curtis.<sup>112</sup> *La Tribuna*, arguing that the Constitution allowed a province to bring an action when the federal government improperly enters the province's sphere of authority, cited Story<sup>113</sup> and a recent discussion between President Lincoln and the Governor of New York over the Union's Civil War draft law.<sup>114</sup>

The issue of the constitutionality of the property tax was ultimately litigated by an individual taxpayer before a federal judge but never appealed to the Supreme Court, probably because the tax lapsed at the end of 1865.<sup>115</sup> When the federal judge handed down a decision finding the tax constitutional, *La Tribuna* responded with six days of extensive editorials refuting paragraph by paragraph what it regarded as an extraordinarily "sophist" decision.<sup>116</sup> But the loss in court was softened with the boast that "we cannot refrain from congratulating ourselves upon seeing how the theories and principles of the institutions which have raised the United States to its present

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*poder judicial*, LAS NACIÓN ARGENTINA, Oct. 16, 1863, at 1; *La justicia federal y los gallos*, LA NACIÓN ARGENTINA, Oct. 17, 1863, at 1; *Mala fé*, LA NACIÓN ARGENTINA, Oct. 18, 1863, at 1. The federal tax was established by LEY 54, promulgated September 14, 1863. LEY 54, Sept. 14, 1863 [1852–1880] A.D.L.A. 412.

109. See LEY 12, arts. 1–2, Sept. 3, 1862, [1852–1880] A.D.L.A. 217, 217; DIEGO ABAD DE SANTILLÁN, 3 HISTORIA ARGENTINA 106, 108–09 (1965).

110. *Story y la jurisdicción de la corte federal*, LA NACIÓN ARGENTINA, Oct. 8, 1863, at 1; *El caso, según Story*, LA NACIÓN ARGENTINA, Oct. 9, 1863.

111. *Story y la jurisdicción de la corte federal*, LA NACIÓN ARGENTINA, Oct. 8, 1863, at 1; *Confesión paladina*, LA NACIÓN ARGENTINA, Oct. 9, 1863, at 1.

112. *La autoridad de Curtis*, LA NACIÓN ARGENTINA, Oct. 13, 1863, at 1.

113. *La Corte Supreme es competente*, LA TRIBUNA NACIONAL, Oct. 7, 1863, at 2; *Jurisdicción*, LA TRIBUNA NACIONAL, Oct. 8, 1863, at 2; *Cuestión importante*, LA TRIBUNA NACIONAL, Oct. 9, 1863, at 2.

114. *La elocuencia de los hechos*, LA TRIBUNA NACIONAL, Oct. 15, 1863 at 2; *Jurisdicción*, LA TRIBUNA NACIONAL, Oct. 8, 1863, at 2; *Cuestión importante*, LA TRIBUNA NACIONAL, Oct. 9, 1863, at 2.

115. See LEY 54, *supra* note 108.

116. *Sentencia Importante*, LA TRIBUNA NACIONAL, Mar. 4, 1865, at 2; *La sentencia del Dr. Ocantos*, LA TRIBUNA NACIONAL, Mar. 5, 1865, at 2 (calling the decision "sophist"); *La sentencia del Juez acional sobre la ley de contribución directa*, LA TRIBUNA NACIONAL, Mar. 7, 1865, at 2 (calling the decision "sophist"); *La Sentencia del Juez nacional sobre la ley de contribución directa*, LA TRIBUNA NACIONAL, Mar. 8 1865, at 2; *La sentencia del Juez nacional sobre la ley de contribución directa*, LA TRIBUNA NACIONAL, Mar. 9, 1865, at 2; *Jurisdicción y soberanía*, LA TRIBUNA NACIONAL, Mar. 10, 1865, at 2.

heights have started to be practiced among us."<sup>117</sup> The paper concluded that "[o]nce the Supreme Court decides that the law establishing a direct tax has been properly established by Congress, there is nothing to do but to submit to the decision, even if it conflicts with our opinions."<sup>118</sup>

### III. CONCLUSION

The process by which U.S.-style judicial review came to be adopted in Argentina owed far more to the prestige of the U.S. model than to any political calculations among members of the Argentine elite during the 1850s and '60s. While President Mitre, in 1862, appointed members of the opposition to the Supreme Court,<sup>119</sup> most likely as a way of reassuring the opposition that they would have a space on a key institution for resolving political disputes, such concerns were alien to the debates of 1857 and 1858. The key then, and to the ever-strengthening influence of the U.S. model during the early decades of the Constitution of 1853, was the authority that the model enjoyed through its prestige.

Ultimately even Vicente Quesada would have to adopt the voice of U.S. constitutionalism, at least for a time. In the 1860s and 1870s, Quesada co-edited a literary and legal periodical, and not surprisingly given his Argentine readership, the articles on constitutional law and the judiciary focused on U.S. practice.<sup>120</sup> He even engaged in *de rigueur* invocations of the U.S. model before the Argentine Supreme Court. In 1869, Quesada presented an appeal to the Supreme Court over a sentence of 10 years exile and a 2,000 peso fine for his client's participation in a provincial rebellion and acting as a leader in the rebel government, and in tune with the times he wrote:

Ah, your Excellency, if instead of finding myself in the Argentine Republic, I might be before the Tribunals of the United

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117. *Sentencia Importante*, LA TRIBUNA NACIONAL, Mar. 4, 1865, at 2.

118. *Id.*

119. A description of the judges appointed by Mitre appears in ZAVALÍA, *supra* note 87 at 66–73, where the president of the Court was President Urquiza's former Vice President, Salvador María del Carril.

120. Vicente Quesada started *La Revista de Buenos Aires* together with Miguel Navarro Viola in 1863 and published an extensive study of U.S. law by Manuel R. García, the attorney that the government had sent to the United States to study its procedural system. See García, *Estudios sobre derecho federal*, and his later four-part article, *Estudios sobre la justicia federal americana en su aplicación a la organización constitucional argentina*, (Dec. 1865–Sept. 1866).

States of the North, whose institutions serve as a model for us and whose case law we so avidly study, it would be enough to recall the great example of moderation and good sense given by President Johnson, blocking the trial of the rebel president of the South. There, where free institutions are a fact, prudence is the great advisor of public men; and hardly had the great fight that convulsed that great nation ended then instead of terrifying the rebels with punishments, the first citizen, the President himself, bought time to let passions calm and restore to liberty the first of those responsible, the President of the rebel States.<sup>121</sup>

After describing the suffering of his client, he then concludes:

What a difference between these two peoples! And we pretend to imitate the United States of the North, whose great lessons we depart from with unforgivable naïveté!

No, your Excellency, it is that in the United States they seek to preserve the constitution through love and liberty, while we, still Spanish colonists in our rancorous passions, seek order by terrifying those who straying, commit political crimes!<sup>122</sup>

As a professional in the 1860s, Quesada no longer had the liberty to seriously question the U.S., and virtually no member of the Argentine elite would do so until the 1880s.

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121. Vicente G. Quesada, *De las circunstancias atenuantes en los delitos de rebelión*, in 20 LA REVISTA DE BUENOS AIRES 451 (1869). This journal, co-edited by Quesada, published the full text of the brief.

122. *Id.* at 384–85.